

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

In the Matter of

PP Docket No. 93-253

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

To: Regina Keeney, Chief
Wireless Bureau

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FEDERAL TELECOMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**REQUEST FOR CLARIFICATION, OR IN THE ALTERNATIVE,
PETITION FOR WAIVER**

Pursuant to Sections 1.3 and 24.819(a) of the Federal Communications Commission's ("FCC") rules, Essence Communications, Inc. ("Essence"), through, its counsel, respectfully requests a clarification of its rules regarding the computation of gross revenues or in the alternative a waiver¹ of the FCC's proposed rules as set forth in the Further Notice Of Proposed Rule Making ("NPRM"), PP Docket No.93-253. Released June 23, 1995 at ¶ 26-27. This pleading follows a July 12, 1995 conference call with FCC officials in the Wireless Bureau²

¹ The idea of a waiver to the proposed NPRM was endorsed by a number of parties. See Comments On Further Notice of Proposed Rule Making submitted on July 7, 1995 by National Paging & Personal Communications Association (NPPCA), Communications Task Force, National Institute of Communication & Education (NICE), and Minority Media and Telecommunications Council (MMTC). See also, Comments of National Association of Black Owned Broadcasters filed July 7, 1995.

² The Wireless Bureau officials, among others, participating on the conference call included Regina Keeney, Peter Tehula, and Jackie Chorney. Thomas A. Hart, Jr., counsel for Essence, also participated during the conference call. The parties (Wireless Bureau officials and Mr. Hart), agreed during the conference call that the instant pleading would be filed,

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concerning Essence's accounting practices and revenue calculations (See Footnote 4), in which a general conclusion was reached that Essence qualifies as a "small business" without a waiver (See financial information contained in the attached Affidavit of Harry Dedyo, Chief Financial Officer of Essence); however, in the alternative, a de minimis waiver should be granted as set forth below and this submission should be considered as a Petition For Waiver.

I. Summary

If necessary, Essence requests a waiver of Section 24.720(b)(1)³ of the proposed rules to permit it to be eligible for the installment payments and bidding credits available only to "small businesses" participating in the FCC C Block auction, re-scheduled for August 29, 1995. Essence should be granted a waiver for good cause due to the following: 1) its justifiable reliance on the previous rules; 2) its inability to access adequate capital from traditional sources; 3) compelling governmental interests; and 4) the de minimis nature of the waiver; and 5) "plus" factor for minorities and women⁴ are both narrowly tailored to further compelling governmental interests. Granting Essence's waiver request is in the public interest.

acknowledging the collective belief that Essence qualifies as a "small business", but seeking a confirmation of that determination or in the alternative a waiver.

³ A *small business* is an entity that together with its affiliates has average annual gross revenues that are not more than \$40 million for the preceding three calendar years.

⁴ See also, TV 9 Inc. v. F.C.C., 495 F.2d 929, 942 (1974) ("[In] view of the nature of the issues in this case, and the probability that Black persons having substantial identification with minority rights will be able to translate their positions, though not technically 'managerial', and their ownership stake, into meaningful effect on this aspect of station programming, we think that such material factors residing in the evidence cannot reasonably be totally and rigidly excluded from favorable consideration.").

II. Essence Communications, Inc.

Essence is a twenty-five year old minority-owned communications company, best known for publishing "ESSENCE" magazine (See attached Affidavit of Clarence O. Smith, President of Essence). Essence began with a very limited capital base, similar to most small businesses. Until 1993, revenues were below the \$40 million⁵ threshold required for small business status. Although relatively small, with a subscription base of approximately one million readers, it has been able to express the concerns and views of African Americans throughout its history, by concentrating on issues related to African American women. Essence is unique because it has discovered how to market to African American women, a previously ignored consumer segment of America until 1970, when Essence began. Essence plans to use this unique marketing expertise to initially introduce and market personal communications services ("PCS") to its subscribers, and to expand from that point to the other customers within the BTAs it acquires in the C Block auction. Conversely, even today, the paradigm for cellular phone users, an example similar to PCS, is certainly not African American women, evidenced by numerous advertisements for such telecommunications services. Nevertheless, Essence will attempt to bring new ideas and services to the marketplace in the PCS industry, as it has so successfully in the magazine industry.

Essence is one of the primary voices in the African American community and will continue to fulfill that role as a PCS licensee.

⁵ Gross Revenues over the last four years are as follows: 1) 1994-\$44,477,000; 2) 1993-\$41,168,000; 3) 1992-\$34,823,000; and 4) 1991-\$26,717,000. Essence is on a calendar year-end.

III. The FCC has Broad Discretion in Granting Waivers

Under Section 1.3 of the FCC's rules, the FCC has the discretion of waiving its rules on a showing of good cause. The FCC may exercise this discretion where the factual circumstances make strict compliance with the rules inconsistent with the public interest. See Northeast Cellular Telephone Co. v. F.C.C. ("Northeast"), 897 F.2d 1164, 1166 (D.C. Cir. 1990). Additionally, the FCC may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. WAIT Radio v. F.C.C. ("WAIT"), 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

IV. Good Cause Exists for Granting Essence a Waiver

If necessary, a waiver would allow Essence to bid as a small business, taking advantage of the 25% bidding credit, and a more advantageous installment payment plan, among other preferences. Granting Essence a waiver recognizes its continuing inability to adequately access traditional sources of capital for its interest in a PCS enterprise. Essence, historically, had revenues below \$40 million, and as a result faced financial barriers comparable to those faced by other small businesses attempting to bid for PCS licenses.

A. Essence Justifiably Relied On Long Standing Rules for the PCS Auction

Congress has mandated that the FCC "promote economic opportunity and competition to ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B).

Pursuant to congressional mandate, the FCC created the entrepreneurs' block, and included financial limits, preferences and bidding credits, and installment payments. The entrepreneurs' block allowed small minority and women-owned companies, which generally lack adequate access to traditional sources of capital, to compete for PCS licenses in the C Block auction.

Under the previous rules, prior to the NPRM, Essence justifiably, and reasonably relied on receiving at least a 15% bidding credit, as well as other preferences. Fifth Memorandum and Order, in PP Docket No. 93-253, Released November 23, 1994 at ¶ 97. Essence viewed the 15% bidding credit under the previous rules as "money in the bank". In reliance upon those previously existing rules, Essence formulated its financial plans and projections with that 15% bidding credit as an essential component.

In a recent case, the FCC acknowledged that companies rely upon its decisions, and when those decisions are reversed, steps should be taken to minimize the impact on the affected parties in reliance thereon. In the Matter of NYNEX Telephone Companies ("NYNEX"), 9 FCC Rcd 1608, FCC 94-53, Adopted March 7, 1994. In NYNEX, the Common Carrier Bureau ("Bureau") granted a limited waiver to NYNEX on February 11, 1993. Id. at ¶ 6. Subsequently, on October 13, 1993, the FCC adopted a Memorandum Opinion and Order ("Review Order") overturning the Bureau's waiver order. NYNEX Telephone Companies, Tariff FCC F.C.C. No. 1, Transmittal No. 127, 7 FCC Rcd 7684 (1993). "To protect existing customers against unreasonable disruptions to their services, we permitted the waiver to remain in effect for existing customers for a twelve-month transition period." NYNEX at ¶ 7. In taking this "transition action", the FCC considered "the legitimate expectations and needs of

customers who received service pursuant to the Bureau's waiver order," and "determined that existing customers would suffer disruption in their businesses if this service were to be withdrawn precipitously." *Id.* at ¶ 11. Explaining its decision further, the FCC stated the following:

"New customers whose orders were not filled as of the release of our Review Order placed their orders in good faith and in reliance on NYNEX's effective tariff (granted by the FCC). These customers had a reasonable expectation that their business needs would be met by becoming [NYNEX] customers. We are modifying the interim provisions of the Review Order to provide equitable treatment for these new customers. We also find it reasonable to extend the waiver provisions to customers that placed orders after the stay [of the Review Order] and before the release of this order. Given that the court's stay of our [Review Order] had the effect of reinstating the Bureau's waiver order in its entirety, these customers also placed orders in good faith reliance on NYNEX's tariff and a reasonable expectation that their orders would be met. Thus, in balancing the potential harm to those customers and the public interest in a pro-competitive marketplace, we find it reasonable to remove the restriction and also permit customers to order circuits subject to the conditions of the waiver established in the Review Order." *Id.* at ¶ 16, 17.

Thus, in examining the effects of a change in previously relied upon FCC policy, for purposes of determining "unreasonable disruption" prior to granting a waiver, the FCC considered whether the customer (or applicant) exercised reasonable good faith reliance on the previously existing policy, as well as the effects on competition and potential harm.

Essence, in good faith, relied on the FCC's previously existing rules and procedures for minority-owned companies, and made business plans and financial arrangements with them in mind. Such action was at least as reasonable as that of the customers above with respect to reliance on the tariffs granted by the Bureau to NYNEX. Essence will also experience something beyond unreasonable disruption if it is not granted a waiver allowing it to have small

business status for the C Block auction. The customers in the above case would have to forgo a service by NYNEX, however, Essence would be foreclosed from effectively competing in the PCS auction entirely. Without a small business determination to bolster its capital, the potential harm to Essence and enhanced competition in PCS is clear, and articulated herein.

Additionally, Essence participated in the National Narrowband auction which contained minority enhancements, but reluctantly withdrew when the bidding exceeded its available resources. Thereafter, many senior FCC officials encouraged it to participate in the C Block auction whose minority preferences were in place.

Despite a 40% bidding credit⁶, it was not a successful bidder in the Regional Narrowband auction because it decided to preserve its capital resources for the Broadband auction.

Without the small business benefits, Essence will not be able to implement its goal of focusing on urban areas, many of which have large underserved minority populations. Further, without the small business preferences and bidding credit, Essence will not be able to bid as high as it otherwise would have, ultimately lessening the amount the winning bidders in those markets will pay the federal government for their licenses.

Thus, the foregoing reasons clearly state that Essence reasonably relied upon the FCC's previously existing rules and procedures, and should be found to be a small business.

⁶ Comments filed by Essence were instrumental in establishing the 40% bidding credit available for minority businesses in the Narrowband auction. Essence has been a vocal advocate for the FCC and its rules and procedures since the beginning of its auction authority. Essence has also defended the FCC's PCS rules in the media, in its publication called "Income Opportunities", and on Capitol Hill.

B. Inability to Access Adequate Capital

To support the difficulty Essence has experienced in acquiring financing for the C Block auction, there is documented record evidence in this proceeding (and other related proceedings) that women and minority-owned business have unique problems accessing capital in today's economic and political environments. The entrepreneurs' block was originally created to enhance economic opportunities for smaller enterprises that do not have adequate access to capital. These rules and regulations recognized the special barriers women and minorities face in gaining entry into the capital-intensive telecommunications industry. Bidding credits and favorable installment payments were methods of providing capital to the smaller companies in the C Block auction. A company's access to capital is directly linked to their ability to take advantage of business opportunities. Without the bidding credit and other small business preferences, Essence's ability to take advantage of this PCS opportunity, as a minority-owned enterprise, is substantially eliminated.

Essence has been unable to secure adequate financing from traditional sources for its PCS venture. Essence also does not have a large telecommunications partner. Thus, its dependence on the bidding credits and other preferences is even more significant. By being a "small business", Essence will hopefully be able to overcome barriers to entry affecting most minority businesses, primarily inability to access adequate capital.

It is important for the FCC to remember the history of broadcasting because it is still relevant in 1995. Radio stations were begun by newspaper publishers who had no experience in the radio industry. Radio stations owners were the first television broadcast licensees. Again, those radio operators had no television broadcast experience. Nevertheless, in both

instances, those newspaper publishers and radio stations could secure adequate financing to enter a new business.

When newspaper publishers entered radio, there were hundreds of African American publishers, but none of them were able to enter the radio, and later telecom industries because they lacked sufficient capital to do so. Today, Essence, a magazine publisher and communications company, is also still facing the problem of inadequate capitalization to enter the next medium of communications. As such, although its revenues may slightly exceed those of a small business as defined by the FCC (\$40 million), its ability to access capital for telecommunications and PCS is well below that of many non-minority \$40 million companies. Thus, that is why the small business preferences are critical to Essence's success in the C Block auction.

Since Essence does not have adequate access to traditional sources of capital, without the benefits allotted to small businesses under the NPRM, it will incur severe negative economic impact because it will not be able to effectively compete in the C Block auction. In a very recent case, "economic impact" was recommended by the FCC for review in the determination of public interest. Fox Television Stations, Inc. ("Fox"), FCC 95-188, Adopted May 4, 1995 at ¶ 179. In fact, the FCC stated the following: "we specifically invite [Fox Television Station, Inc.] to submit information regarding costs or other impacts of achieving benchmark compliance and the extent to which achieving compliance would adversely affect the public interest. Id. Although the FCC has not ruled on Fox's subsequent filing, it is clear that the "economic impact" of the failure to obtain small business status for Essence will produce a negative impact on competition, and will only exacerbate Essence's inability to access adequate capital to bid in

the C Block auction. Thus, when considering Essence's request, denial of such would adversely affect the public interest.

C. Compelling Governmental Interests

1. Competition and Deployment. Congress believed that competition was critical to the continued success of the telecommunications industry. However, one's competitiveness in the auction, build-out, and eventual marketing of PCS products correlates directly with their financial capabilities. Thus, greater financial flexibility will enable a company to more effectively compete, thereby bidding higher for the license(s). As the number of competitors in PCS increases, the costs for consumer service will decrease. Additionally, any money saved on a winning bid, could be used for the ensuing build-out financing necessary to activate the license.

2. Universal Service. More competitors will also have a positive effect on the accessibility of PCS for underserved areas and populations. This phenomenon is particularly true for minority-owned companies like Essence, which already has existing customer bases in the ethnic communities of the nation.

3. Technological Advancement. Many of the recent innovations in telecommunications have come from smaller companies. Thus, by diversifying the competitors in PCS in a meaningful way, the opportunities for innovation significantly increase. Essence plans to provide PCS to an underserved urban population, so it will have to develop innovative products to serve that currently underserved market. Further, with its unique marketing ability within the African American community, no company is better suited to fulfill the challenge of bringing PCS to that underserved population.

4. Diversity. Congress mandated that the FCC diversify the licensees of PCS.

As articulated above, Essence is uniquely able to reach African Americans, and has effectively done so for the last twenty-five years. A nexus does exist between diversity of ownership and diversity of services and programming. Thus, if minority-owned companies, such as Essence, do not successfully acquire PCS licenses, then significant segments of our population will remain technologically underserved.

As cable television, telephones, on-line services, and computers converge, they will serve as conduits of information and differing viewpoints. Essence will articulate the minority perspective by providing diverse programming, upheld in Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 566 (1990). Further, Essence has been articulating the minority viewpoint, twelve months a year, for twenty-five years, and continuance in that role is an irrebuttable presumption.

5. Employment. Essence is committed to providing accessibility to PCS for underserved urban areas, and to do so will require a significant amount of capital. By focusing on urban areas, otherwise previously foreclosed employment opportunities will be created in the PCS and telecommunications industry for minorities and women. As evidenced by its own staff of over 100 employees, Essence is committed to providing employment opportunities and training for all Americans.⁷

⁷ See Footnote 34, Metro Broadcasting, Inc. v. F.C.C. ("Metro"), 497 U.S. 547, 582 (1990). See also, Footnote 7, NAACP v. FPC, 425 U.S. 662, 670 (1976).

D. Waiver and "Plus" Factor are Narrowly Tailored to Further Compelling Governmental Interests

Adarand Constructors, Inc. v. Peña, ("Adarand"), No. 93-1841, 25-26, slip. op. (U.S. June 12, 1995) held that all racial classifications would be subject to strict scrutiny. Therefore, in order to be constitutional, they must serve a compelling governmental interest, and be narrowly tailored to further that interest. As stated above, there are obvious compelling governmental interests that would be served by granting Essence a waiver, if necessary.

The U.S. Department of Justice, Office of Legal Counsel, issued a June 28, 1995 Memorandum to General Counsels on Adarand in which waivers were mentioned throughout as providing a means of narrow tailoring to further compelling governmental interests. Waivers are narrowly tailored because they are reviewed on an individualized--case by case--basis. Additionally, the FCC has broad discretionary power to grant waivers, as long as they are based upon good cause and in the public interest. See, Northeast at 1166; and WAIT at 1158.

The above-mentioned waiver is narrowly tailored because it is based on the individual facts of Essence's request. The waiver is not race-based, although race and gender should be considered as "plus" factors. Waivers are a method by which those who may have justifiably relied on preferences for minorities or women, can at least request the preferences reserved for small businesses. Similar to the waiver request the FCC would have granted to Telephone Electronics Corporation for its financial limitations, surely Essence's unique circumstances are equally compelling and deserving of the waiver requested herein.

Unlike the case of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the waiver proposed herein is not a "rigid numerical quota". but instead a flexible tool that allows an

individualized determination of whether a particular individual has suffered one or more hardships. The "plus" factor of the waiver for minorities and women does not impose an undue burden on non-minorities and men, since they are not excluded from applying for it. Further, the waiver does not establish a quota or fixed quantity set-aside. Thus, the waiver proposal would be constitutional under a strict scrutiny analysis.

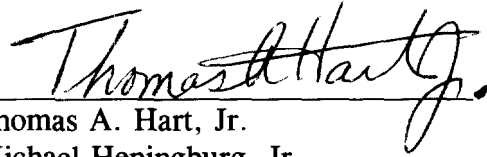
V. Conclusion

Following our conference call with the FCC officials mentioned herein, based on Essences's accounting practices and revenue calculations, we are assuming that Essence is a "small business" under the FCC's definition. See, Section 24.720(b)(1). Nevertheless, in the alternative, this pleading should be considered as a request for a de minimis waiver.

Essence respectfully submits that the special circumstances described herein demonstrate sufficient good cause to warrant a de minimis waiver of the FCC's rules with respect to the small business criteria for gross revenues, and granting such would be in the public interest. See, Northeast at 1166. The granting of a such a waiver with a "plus" factor for minorities and women would not impose an undue burden on the other applicants, who are also eligible to apply for a waiver. Thus, the granting of a waiver with a "plus" for a minority-owned company

known as Essence is in the public interest, and is narrowly tailored to further the compelling governmental interests mentioned herein.

Respectfully submitted,

A handwritten signature in black ink, reading "Thomas A. Hart, Jr." with a stylized flourish at the end.

Thomas A. Hart, Jr.
Michael Heningburg, Jr.
McManimon & Scotland
1275 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 2004
(202) 638-3100

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AFFIDAVIT OF CLARENCE O. SMITH

I, Clarence O. Smith, of 1500 Broadway, 6th floor, New York, New York 10036, do hereby attest to the following facts and conditions:

1. I am the President, and one of the founders of Essence Communications, Inc. ("Essence").

2. I have reviewed the attached Request For Clarification, Or In The Alternative, Petition For Waiver, and the information therein is correct to the best of my knowledge and belief.

3. Essence participated in the National and Regional Narrowband auctions and hopes to participate in the Federal Communications Commission's ("FCC") C Block auction. Over the last twelve months, Essence has spent hundreds of thousands of dollars in preparation for the PCS auctions.

4. Essence began as a start-up company in 1970. According to the corporation's recent annual reports, its gross revenues over the last four years were as follows: 1) 1994-\$44,477,000; 2) 1993-\$41,168,000; 3) 1992-\$34,823,000; and 4) 1991-\$26,717,000. Despite the continuous financial growth of Essence's core publishing business, the corporation has had difficulty in securing a strategic partner and adequate capital for its PCS venture.

5. As a minority-owned company, throughout its history, Essence has had difficulty acquiring adequate capital for its core businesses and for new ventures such as PCS.

6. Essence's ability to raise capital for the PCS auction is comparable to that of a company with revenues well under the FCC's \$40 million threshold for small businesses.

7. Without the preferences and bidding credits articulated in the NPRM for small businesses, Essence will not be able to effectively compete in the in the C Block auction.

I attest under penalty of perjury that the foregoing facts are true to the best of my knowledge, information and belief.

Clarence O. Smith, President¹
Essence Communications, Inc.

Subscribed and sworn to before me
this ____ day of July, 1995.

Notary Public
My commission expires:

¹ A signed, notarized copy of this Affidavit Of Clarence O. Smith will be submitted as a supplement to this Request For Clarification, Or In The Alternative, Petition For Waiver.

AFFIDAVIT OF HARRY DEDYO

I, Harry Dedyo, of 1500 Broadway, 6th floor, New York, New York 10036, do hereby attest to the following facts and conditions:

1. I am the Chief Financial Officer of Essence Communications, Inc. ("Essence").
2. I have reviewed the attached Request For Clarification, Or In The Alternative, Petition For Waiver, and the information therein is correct to the best of my knowledge and belief.
3. Essence participated in the National and Regional Narrowband auctions and hopes to participate in the Federal Communications Commission's ("FCC") C Block auction. Over the last twelve months, Essence has spent hundreds of thousands of dollars in preparation for the PCS auctions.
4. Essence began as a start-up company in 1970. According to the corporation's recent annual reports, its gross revenues over the last four years were as follows: 1) 1994-\$44,477,000; 2) 1993-\$41,168,000; 3) 1992-\$34,823,000; and 4) 1991-\$26,717,000. Despite the continuous financial growth of Essence's core publishing business, the corporation has had difficulty securing a strategic partner and adequate capital for its PCS venture.
5. Essence calculates its gross revenues by combining the following: 1) gross advertising revenues (minus agency commissions, cash discounts, and volume and other discounts); 2) subscription income (minus bad debt expense); 3) newstand draw (minus newstand returns); and 4) list rental income (minus list rental expense).

I attest under penalty of perjury that the foregoing facts are true to the best of my knowledge, information and belief.


Harry Dedyo, Chief Financial Officer
Essence Communications, Inc.

Subscribed and sworn to before me
this 13 day of July, 1995.


Notary Public

My commission expires:

10/23/95

Reg: 01214957806

CERTIFICATE OF SERVICE

I Michael Heningburg, Jr., an Associate of the law firm of McManimon & Scotland, do hereby certify that a copy of the attached Petition for Waiver was served this 13th day of July, 1995 to the following persons by hand:

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Washington, D.C. 20554

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The Honorable Rachell B. Chong
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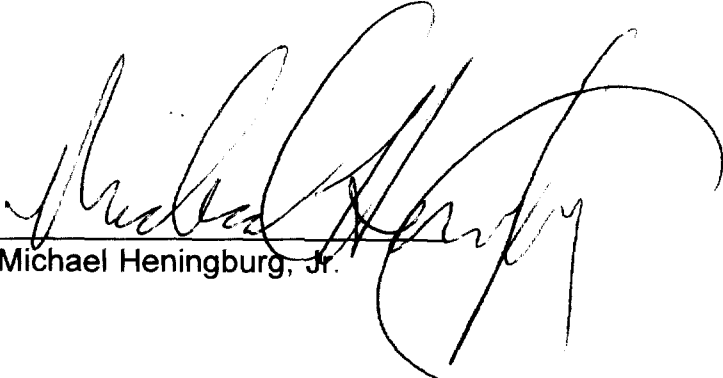
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